

Washington International Law Journal

Volume 28 | Number 1

1-1-2019

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Recommended Citation

Brittney A. Dimond, Comment, *When the ICC Comes Knocking, the United States Should Welcome It with Open Arms*, 28 Wash. L. Rev. 181 (2019).

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WHEN THE ICC COMES KNOCKING, THE UNITED STATES SHOULD WELCOME IT WITH OPEN ARMS

Brittney A. Dimond*

Abstract: The Office of the Prosecutor of the International Criminal Court requested approval to open a formal investigation into war crimes and crimes against humanity allegedly committed in Afghanistan since May 2003. If the investigation is approved, the United States' response will have significant implications not only for relations going forward between the United States and the ICC, but also for the international communities' understanding of the Court's jurisdiction. Three of the United States' likely response options based on its past and current relationship with the ICC include: (1) declining to cooperate with the ICC based on a denial of jurisdiction due to a lack of U.S. consent; (2) negating the ICC's jurisdiction on the basis that the situation is inadmissible to the Court pursuant to the doctrine of complementarity; or (3) contesting the ICC's jurisdiction as precluded by binding agreements made between the United States and Afghanistan. Each of these responses find footing in legal arguments centered on the tension between international jurisdiction and sovereignty. However, waiving jurisdictional challenges specific to this investigation, the United States has a fourth option: compliance. Although unlikely to actualize, this course would position the United States as a global leader for human rights, bolster any future efforts to enforce prosecution against international criminals, and provide much needed recourse to victims of war crimes.

Cite as: Brittney A. Dimond, *When the ICC Comes Knocking, the United States Should Welcome It with Open Arms*, 28 WASH. INT'L L.J. 181 (2019).

I. INTRODUCTION

The International Criminal Court (ICC or “the Court”) is a treaty-based international organization centered around a permanent court that was established for the purpose of investigating and prosecuting war crimes, crimes against humanity, genocide, and the crime of aggression. Advocates for the ICC contend that the Court is a vital tool that allows the international community to hold perpetrators of heinous crimes accountable for actions that might otherwise go unpunished. Since the Court's founding in 2003, it has completed ten formal investigations—referred to as “situations”—resulting in three defendants being found guilty of their charged crime(s), six cases ending in either acquittal or dismissal, and one case currently on appeal.¹ In addition,

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¹ *Situations Under Investigation*, INT'L CRIM. CT., <https://www.icc-cpi.int/pages/situations.aspx> (last visited Aug. 16, 2018).

the ICC currently has eleven situations under investigation as well as eleven preliminary examinations pending before it.²

One of these eleven preliminary examinations that has spurred debate among the international community is the request from the ICC's prosecutor, Fatou Bensouda, to the Pre-Trial Chamber to approve the initiation of a formal investigation into alleged crimes against humanity and war crimes committed in Afghanistan since May 2003.³ If the Pre-Trial Chamber grants this request, it will be significant for two reasons: first, it will be only the second investigation into a situation that occurred outside of Africa;⁴ and second, the investigation is likely to include, within its scope, allegations against American military and CIA personnel.⁵ If the Afghanistan investigation moves forward, it may help ease criticism that the Court is biased against African countries;⁶ however, it would likely also trigger international dispute regarding the Court's jurisdiction. The United States has not ratified the treaty that created the Court and has since rejected ICC claims of authority over U.S. persons.⁷ If the ICC pursues an investigation in Afghanistan that includes allegations against American officials, the United States' response will have consequences not only for the individuals facing accusations, but also the international community at large.

This comment begins with a brief background regarding the establishment of the ICC, the Court's jurisdiction, and the pending Afghanistan investigation that might implicate American nationals. It then explores four possible options the United States could pursue in response to an ICC investigation, and considers the comparative strengths and weakness

² *Id.*

³ *Preliminary Examinations*, INT'L CRIM. CT., <https://www.icc-cpi.int/Pages/Preliminary-Examinations.aspx> (last visited Aug. 16, 2018). When, as in this case, the Prosecutor opens a preliminary examination *proprio motu*, on her own authority, instead of acting upon a request from a States Party or a Security Council request, the Court's Pre-Trial Chamber must approve the Prosecutor's request for a formal investigation to begin. Rome Statute of the International Criminal Court art. 13, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

⁴ INT'L CRIM. CT., *supra* note 1.

⁵ INT'L CRIM. CT.: OFFICE OF THE PROSECUTOR, REPORT ON PRELIMINARY EXAMINATION ACTIVITIES 2016 43–50 (Nov. 14, 2016), https://www.icc-cpi.int/iccdocs/otp/161114-otp-rep-PE_ENG.pdf.

⁶ See Tessa Alleblas, Eamon Aloya, Geoff Dancy & Yvonne Dutton, *Is the International Criminal Court Biased Against Africans? Kenyan Victims Don't Think So*, WASH. POST (Mar. 6, 2017), <https://www.washingtonpost.com/news/monkey-cage/wp/2017/03/06/is-the-international-criminal-court-biased-against-africans-kenyan-victims-dont-think-so/>.

⁷ Steven Groves & Brett Schaefer, *The ICC Investigation in Afghanistan Vindicates U.S. Policy Toward the ICC*, HERITAGE FOUND. (Sept. 14, 2009), http://www.heritage.org/report/the-icc-investigation-afghanistan-vindicates-us-policy-toward-the-icc#_ftn7.

of each. This comment concludes that the correct course, although the most unlikely, is for the United States to comply with the ICC's investigation.

II. BACKGROUND

A. *The Court's Beginning*

In the aftermath of World War II, the Allied nations held criminal trials imposing individual liability upon offenders, including military leaders and personnel, for the crimes committed during the conflict.⁸ Commentators point to the Nuremberg and Tokyo tribunals as a turning point that set the stage for the international community to recognize individual responsibility, instead of state accountability, for certain egregious crimes committed during times of war and peace.⁹ During the Genocide Convention, the U.N. General Assembly recognized the need for a permanent international court to investigate and adjudicate certain categories of atrocities that had been recognized as international crimes.¹⁰ Following the Cold War, nations came together to negotiate the creation of such a court.¹¹ However, while negotiations for the ICC statute were underway, heinous crimes were being committed in Rwanda and the former Yugoslavia. In response to these atrocities, the U.N. Security Council established ad hoc tribunals for each situation.¹² Undeniably, these events played a role in the decision to convene the conference that established the ICC in Rome during the summer of 1998.¹³

In July of 1998, a conference of 160 States established the first treaty-based permanent international criminal court.¹⁴ In addition to instituting the ICC, the Rome Statute outlines the Court's jurisdiction, defines the crimes that fall within that jurisdiction, includes the Court's procedural rules, and establishes the mechanisms for States to cooperate with the ICC.¹⁵ Unlike its predecessor courts, the ICC was created through a multilateral treaty and is

⁸ *The Nuremberg Trial and the Tokyo War Crimes Trials (1945-1948)*, OFF. OF THE HISTORIAN, <https://history.state.gov/milestones/1945-1952/nuremberg> (last visited Aug. 16, 2018).

⁹ INT'L CRIM. CT., UNDERSTANDING THE INTERNATIONAL CRIMINAL COURT, <https://www.icc-cpi.int/iccdocs/PIDS/publications/UICCEng.pdf>.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Rome Statute art. 36, ¶ 1.

not an organ of the U.N.; as such, its jurisdictional force is rooted upon the consent of member parties—known as “States Parties.”¹⁶

The Rome Statute entered into force on July 1, 2002 in accordance with the entry into force provision of Article 126.¹⁷ Although 120 states adopted the Rome Statute in 1988, informally establishing the court, only 60 countries ratified the statute when it entered into force in 2002.¹⁸ As of 2018, there were 138 signatories and 123 States Parties to the treaty.¹⁹ Unlike States Parties, signatory members are not legally bound by the provisions of the Rome Statute and only agree to act in good faith “not to defeat the object and purpose of the treaty.”²⁰ At one point, there were 124 States Parties of the ICC; however, in 2017, Burundi became the first nation to withdraw from the Rome Statute. Since then, several other nations—including Gambia, Russia, South Africa, and the Philippines—have announced intentions to do the same but have yet to formally withdraw.²¹ Of the ICC members, “[33] are African States, [19] are Asia-Pacific States, [18] are Eastern European States, [28] are Latin American or Caribbean States, and [25] are Western European States.”²²

Despite overwhelming support by many of the world’s nation-states and the United States’ initial key role as a negotiating party of the statute, the United States has taken extraordinary steps to exempt itself from the jurisdiction of the court. The United States was deeply involved in the negotiations of the Rome Statute in the 1990s; however, it ultimately voted against adoption at the 1998 United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court.²³ Since then, U.S. support of the ICC has waxed and waned with each administration. In 2000, President Clinton authorized the United States to sign the Rome Statute but did not submit the treaty to the Senate for advice and

¹⁶ Mark D. Kielsgard, *War on the International Criminal Court*, 8 N.Y.C. L. REV. 1, 5 (2005).

¹⁷ Rome Statute art. 126.

¹⁸ *International Criminal Court Fast Facts*, CNN (Sept. 28, 2018), <https://www.cnn.com/2016/07/18/world/international-criminal-court-fast-facts/index.html>.

¹⁹ U.N. Treaty Collection, Status of the Rome Statute of the International Criminal Court (Dec. 13, 2017), https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&clang=en#bottom.

²⁰ Vienna Convention on the Law of Treaties art. 18, Jan. 27, 1980, 1155 U.N.T.S. 331.

²¹ CNN, *supra* note 18.

²² *The States Parties to the Rome Statute*, INT’L CRIM. CT, https://asp.icc-cpi.int/en_menus/asp/states%20parties/ (last visited Nov. 23, 2018).

²³ See David J. Scheffer, Ambassador-at-Large for War Crimes Issues, U.S. Dep’t of State, America’s State in Peace, Security, and Justice, Statement on Creating an International Criminal Court (Aug. 31, 1998).

consent as is necessary for ratification.²⁴ Later, the Bush Administration “unsigned” the Rome Statute and took steps to insulate the United States from ICC jurisdiction.²⁵ While the Obama Administration was more supportive of the ICC—as demonstrated by its participation in ICC meetings, supporting a vote for a Security Council referral of the situation in Libya to the ICC, and turning two individuals over to the ICC for alleged crimes in Uganda and the Democratic Republic of the Congo—it did not re-sign the Rome Statute or seek ratification.²⁶ The Trump administration has yet to directly address the subject of the U.S.-ICC relationship, except for the Draft Executive Order to establish a committee to consider cutting funding even though the United States does not fund the ICC and funding the Court is expressly illegal under the American Service Members Protection Act.²⁷

B. *The Court’s Jurisdiction*

When defining the Court’s jurisdiction, the drafters of the Rome Statute sought to balance a respect for state sovereignty with the desire to protect the inalienability of human rights and avenge violations of such rights.²⁸ As such, the Court has a limited mandate to try individuals (rather than States), and to hold such persons accountable for the most serious crimes of concern to the international community as a whole, namely the crime of genocide, crimes against humanity, war crimes, and crimes of aggression.²⁹

The fourth crime—the crime of aggression—has been a tricky issue for the ICC since its inception.³⁰ Although initially included as one of the crimes that the ICC had jurisdiction over, the parties to the treaty failed to agree on a definition for the crime and under what terms it could be brought.³¹ Without an agreed upon definition, the Court was unable to investigate allegations of

²⁴ Bill Clinton, President of the U.S., Statement Authorizing the US Signing of the Rome Statute of the International Criminal Court, Statement at Camp David (Dec. 31, 2000).

²⁵ Letter from John R. Bolton, Sec’y of State for Arms Control and Int’l Sec., to Kofi Annan, U.N. Sec’y Gen. (May 6, 2002) (transcript available from author).

²⁶ See generally, *Obama Administration*, AM. NGO COALITION FOR THE INT’L CRIM. CT., <https://www.amicc.org/obama-administration> (last visited Dec. 9, 2017).

²⁷ *Trump Administration*, AM. NGO COALITION FOR THE INT’L CRIM. CT., <https://www.amicc.org/trump-administration> (last visited Dec. 9, 2017).

²⁸ See Kielsgard, *supra* note 16.

²⁹ Rome Statute, art. 5; UNDERSTANDING THE INTERNATIONAL CRIMINAL COURT, *supra* note 9.

³⁰ Desmond Davies, *ICC Crime of Aggression Finally Activated*, GHANA NEWS AGENCY (Jan. 30, 2018), <http://www.ghananewsagency.org/world/icc-crime-of-aggression-finally-activated-128060>.

³¹ *Id.*

crimes of aggression, further narrowing the Court's scope of review.³² Commentators saw the prolonged debate as a move by powerful states, many with a propensity for aggression against weaker states, to delay the process for as long as possible to further shield their conduct from repercussions.³³ On the other hand, those that opposed including the crime of aggression within the Court's jurisdiction argued that the looming threat of prosecution would have a chilling effect on coalition building between nations seeking to address massive humanitarian emergencies with military responses, especially in light of the increasing difficulty of securing Security Council authorization for such efforts given the often conflicting interests of voting nations.³⁴

Interestingly, a consensus on the definition of the crime was reached in 2009. However, that definition was not included in a resolution for ratified until 2017 at the 16th Assembly of State Parties to the Rome Statute in New York.³⁵ After the resolution passed, the current definition entered into force on July 17, 2018.³⁶ However, the resolution is only applicable to ICC member states that ratified or accepted the Amendment to the Rome Statute, which at this time consists of only thirty-five states.³⁷

According to the Rome Statute, the Court secures its jurisdiction through the treaty-based consent of member states which grants the Court authority over the enumerated offenses.³⁸ Such jurisdiction is distinct from that of universal jurisdiction, which relates to the ability and obligation of national courts to investigate and prosecute particularly egregious crimes—including all of the crimes enumerated within ICC's jurisdictional scope.³⁹

³² Alex Whiting, *Crime of Aggression Activated at the ICC: Does it Matter?*, JUST SECURITY, (Dec. 19, 2017), <https://www.justsecurity.org/49859/crime-aggression-activated-icc-matter/>.

³³ Davies, *supra* note 30.

³⁴ See Whiting, *supra* note 32.

³⁵ Davies, *supra* note 30.

³⁶ *Id.* The amendment defines the "crime of aggression" as: "the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations." Rome Statute art. 8, ¶ 1.

³⁷ Davies, *supra* note 30.

³⁸ Rome Statute art. 12.

³⁹ *Basic Facts on Universal Jurisdiction Prepared for the Sixth Committee of the United Nations General Assembly*, HUM. RTS. WATCH (Oct. 19, 2009), <https://www.hrw.org/news/2009/10/19/basic-facts-universal-jurisdiction>.

Significantly, universal jurisdiction applies only to nations and is therefore not an available source of jurisdiction for the ICC.⁴⁰

In order for a case to be justiciable before the ICC, jurisdiction must be proper, which includes temporal, subject matter, and territorial jurisdiction elements.⁴¹ Therefore, in order for jurisdiction to be proper, the crimes in question must: (1) have been committed after the inception of the ICC or after the relevant State Party joined the ICC; (2) fall within the definition of at least one of the four expressed crimes; and (3) have been committed by a member state's national or have occurred within the member state's territory.⁴²

Under Article 13 of the Rome Statute, there are three ways an investigation may be initiated.⁴³ Investigations may be referred to the Office of the Prosecutor (OTP) by either State Parties or the Security Council pursuant to Chapter VII of the Charter of the United Nations.⁴⁴ In addition, the Prosecutor⁴⁵ may initiate an investigation in respect to the relevant crimes, *proprio motu*, or at his or her own discretion, but under such circumstance the Rome Statute requires Pre-Trial Chamber approval to move forward.⁴⁶

C. The Investigation

On November 3, 2017, the Prosecutor for the ICC, Fatou Bensouda, announced her formal request for authorization from the Court's Pre-Trial Chamber to open an official investigation into war crimes and crimes against humanity allegedly committed in Afghanistan since May 2003.⁴⁷ This announcement came after the Prosecutor's decade-long preliminary

⁴⁰ Michael P. Scharf, *Universal Jurisdiction and the Crime of Aggression*, 53 HARV. INT'L L.J. 358, 365 (2012).

⁴¹ Laura Dickinson & Alex Whiting, *Expert Q&A: The International Criminal Court's Afghanistan Probe and the US*, JUST SECURITY (Mar. 26, 2018), <https://www.justsecurity.org/54276/backgrounder-icc-afghanistan-probe-us-expert-qa/>.

⁴² Rome Statute art. 12.

⁴³ *Office of the Prosecutor*, INT'L CRIM. CT., <https://www.icc-cpi.int/about/otp> (last visited, Nov. 5, 2018).

⁴⁴ Rome Statute art. 13.

⁴⁵ The Office of the Prosecutor is an independent organ of the Court that is responsible for investigating situations under the Court's jurisdiction. Like the judges of the Court, the Prosecutor and Deputy Prosecutor are elected by the Assembly of States Parties for a non-renewable nine-year term. The current Prosecutor is Ms. Fatou Bensouda from The Gambia. See *Office of the Prosecutor*, *supra* note 43.

⁴⁶ *Id.*; see also, Dickinson & Whiting, *supra* note 41.

⁴⁷ Fatou Bensouda, Int'l Crim. Ct. Prosecutor, Statement Regarding Her Decision to Request Judicial Authorization to Commence an Investigation into the Situation in the Islamic Republic of Afghanistan (Nov. 3, 2017) (transcript available from author).

investigation into the situation.⁴⁸ Although the ICC was established in 2002, Afghanistan did not accede to the Rome Statute until 2003; therefore, the ICC does not have the authority to investigate crimes committed in Afghanistan before the indicated dates.⁴⁹

If approved, the investigation will focus on alleged crimes committed by the Taliban, ISIS, Afghan security forces, warlords, the U.S.-led coalition, and others during the lengthy wars in Afghanistan.⁵⁰ It was reported that the Court received over a million allegations of abuses and atrocities in relation to the proposed investigation.⁵¹ Although the details of the request have not been released, Bensouda has previously indicated that the investigation could include allegations of torture and misconduct by U.S. military forces in Afghanistan between 2003 and 2004, as well as at CIA facilities in Lithuania, Poland, and Romania, all of which are ICC state members.⁵²

Because the Prosecutor has proceeded *proprio motu*, on her own authority, instead of acting upon a request from a States Party or a Security Council request, the Court's Pre-Trial Chamber must approve the Prosecutor's request.⁵³ No official deadline was given for the judges to respond to Bensouda's request;⁵⁴ however, close observers of the ICC consider approval very likely.⁵⁵ Pursuant to Article 15(4) of the Rome Statute, the Pre-Trial Chamber "shall" authorize an investigation if it finds there is a reasonable basis to proceed with an investigation after considering the same factors addressed by the Prosecutor in making her decision to initiate the request—primarily jurisdiction, admissibility, and the interests of justice.⁵⁶

⁴⁸ Katherine Gallagher, *The ICC Must Hold the US Accountable for Crimes in Afghanistan*, GUARDIAN (Feb. 16, 2018), <https://www.theguardian.com/commentisfree/2018/feb/16/icc-us-accountable-for-crimes-afghanistan>.

⁴⁹ Rome Statute art. 11(1).

⁵⁰ David Davenport, *Will the International Criminal Court Prosecute American Over Afghanistan?*, FORBES (Mar. 26, 2018), <https://www.forbes.com/sites/daviddavenport/2018/03/26/will-the-international-criminal-court-prosecute-americans-over-afghanistan/>.

⁵¹ *Id.*

⁵² INT'L CRIM. CT., *supra* note 5.

⁵³ Rome Statute art. 13.

⁵⁴ James McAuley, *ICC Prosecutor Seeks Probe into War Crimes Allegations Against U.S. Military, CIA in Afghanistan*, WASH. POST (Nov. 20, 2017), https://www.washingtonpost.com/world/asia_pacific/icc-prosecutor-seeks-probe-into-war-crimes-allegations-against-us-military-cia-in-afghanistan/2017/11/20/e8ec73b8-ce1e-11e7-a87b-47f14b73162a_story.html.

⁵⁵ Kevin Jon Heller, *Initial Thoughts on the ICC's Decision to Investigate Afghanistan*, OPINIO JURIS (Nov. 3, 2017), <http://opiniojuris.org/2017/11/03/otp-decides-to-investigate-the-situation-in-afghanistan/>.

⁵⁶ Dickinson & Whiting, *supra* note 41.

At this stage, the Pre-Trial Chamber makes these determinations with respect to the situation as a whole, not necessarily with respect to each individual potential case.⁵⁷ If the requirements to approve the investigation are satisfied by some of the potential cases within the situation, that would be sufficient to authorize the investigation into the entire situation. So even if there exist possible jurisdictional or admissibility challenges to particular potential cases within a situation, it is not necessary that the Pre-Trial Chamber resolve such issues at this stage or deny the investigation in its entirety.⁵⁸ Although, the Pre-Trial Chamber likely could, if it wished to, resolve such issues if they were formally raised.⁵⁹

In a statement given on December 8, 2017, at the 16th Session of the Assembly of State Parties, a representative for the United States reaffirmed the United States' rejection of "any assertion of ICC jurisdiction over nationals of States that are not parties to the Rome Statute, absent a UN Security Council referral or the consent of that State."⁶⁰ The representative went on to formally object to the proposed investigation involving U.S. personnel in the Afghanistan situation and to remind those in attendance that while the United States is "committed to accountability[,] it expects States Parties to "respect" its refusal to join the ICC and place its citizens under the court's jurisdiction.⁶¹

II. THE UNITED STATES' RESPONSE OPTIONS

The United States has, since the founding of the Court, maintained its position that the ICC cannot exercise jurisdiction over Americans because the

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ Rome Statute art. 19, ¶¶ 4, 6. The Statute expressly permits states to weigh in at this stage only on the narrow issue of whether it is investigating and prosecuting the same persons for the same potential crimes for purposes of determining if the doctrine of complementarity precludes ICC jurisdiction. However, Rule 103 of the Court's Rules of Procedure and Evidence provides that "[a]t any stage of the proceedings, a Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to a State, organization or person to submit, in writing or orally, any observation on any issue that the Chamber deems appropriate." Presumably, as a show of sovereign deference, the Pre-trial Chamber would permit any state implicated by the proceedings, such as the United States, to submit its observations at any stage of the proceedings on any matter. Dickinson & Whiting, *supra* note 41.

⁶⁰ *Statement on Behalf of the United States of America 16th Session of the Assembly of States Parties*, JUST SECURITY (Dec. 8, 2017), <https://www.justsecurity.org/wp-content/uploads/2017/12/united-states-statement-international-criminal-court-icc-afghanistan-december-2017.pdf>.

⁶¹ *Id.*

United States has not ratified the Rome Statute.⁶² On the other hand, the ICC upholds its position that it does have jurisdiction over American personnel's conduct in Afghanistan because the latter is a member state that has, by acceding to the Rome Statute, granted the ICC jurisdiction over certain crimes committed within its territory.⁶³ While it is uncertain if the Pre-Trial Chamber will approve Bensouda's request to open an investigation regarding the conduct of American officials in Afghanistan or elsewhere, the United States would have to decide how to respond if such approval is attained.

This paper evaluates four possible approaches the United States could take in its response to an ICC investigation: (1) refuse to cooperate with the ICC based on a denial of jurisdiction due to a lack of U.S. consent; (2) challenge the ICC's jurisdiction on the basis that the situation is inadmissible for the Court pursuant to the doctrine of complementarity; (3) refute the ICC's jurisdiction as precluded by binding agreements made between the United States and Afghanistan; or (4) accede jurisdiction specific to this investigation and comply with ICC requests. Scholars and commentators consider the first three the more likely possibilities. This comment considers the varying legal legitimacy of each, after which this comment argues that instead of denying the ICC's claim to jurisdiction over this matter on any legal basis, the United States should comply with the investigation in order to best serve its political and humanitarian goals.

A. *Option 1: Deny Jurisdiction Based on a Lack of Consent*

A fundamental principle of international law is that a state's legal obligations are based upon its expressed consent to be bound through ratification of agreed-upon commitments or a long-standing practice and observance among sovereign nations sufficient to create an international custom.⁶⁴ If a state freely chooses to subject its citizens to the jurisdiction of the ICC by signing and ratifying the Rome Statute, then that is its choice.⁶⁵

⁶² David Bosco, *US Options for Responding to ICC Scrutiny in Afghanistan*, LAWFARE (Feb. 23, 2017), <https://www.lawfareblog.com/us-options-responding-icc-scrutiny-afghanistan>.

⁶³ *Id.* (relying on Rome Statute art. 12, ¶ 2(a)).

⁶⁴ See Joshua Wood, *What is Customary International Law*, RULE OF LAW INSTITUTE OF AUSTRALIA (Mar. 14, 2017), <https://www.ruleoflaw.org.au/what-is-customary-international-law/>.

⁶⁵ Brett Schaefer, *How the U.S. Should Respond to ICC Investigation into Alleged Crimes in Afghanistan*, HERITAGE FOUND. (Nov. 15, 2017), <https://www.heritage.org/courts/report/how-the-us-should-respond-icc-investigation-alleged-crimes-afghanistan>.

The United States has not made that decision and as such, arguably should not be subject to ICC jurisdiction absent its consent.⁶⁶

This position, as historically relied upon by the United States, has limited support among the international community because most legal scholars believe that ICC member states are able to delegate to the Court the criminal jurisdiction states inherently have over their own territory.⁶⁷ Additionally, there is an argument that by choosing to keep military personnel in the territory of a States Party to the ICC,⁶⁸ the United States tacitly consented to the jurisdiction of the ICC because, as one of the primary parties to the initial negotiations of the Rome Statute, the United States was cognizant of the Court's jurisdictional provisions including Article 12(2)(a) which provides for jurisdiction over all conduct occurring within the territory of a member state.⁶⁹

In addition to having knowledge of the Court's jurisdictional provisions, the United States has arguably implicitly indicated its recognition of the Court's legitimate jurisdiction over non-member states through state territorial jurisdiction delegation when it insisted upon a bilateral agreement with Afghanistan to allow the United States to maintain exclusive jurisdiction over U.S. military and supporting personnel working in Afghanistan.⁷⁰ While the initial immunity agreements were negotiated prior to Afghanistan's accession to the Rome Statute, multiple agreements were re-negotiated in 2014, as the NATO International Security Assistance Force mission was ending and a new mission to "train, advise and assist Afghan forces" was being arranged.⁷¹ The renewed agreements required that the United States maintained exclusive jurisdiction over any criminal conduct committed by its nationals as a precondition for continued military support.⁷² The demanded prerequisite suggests a recognition that without such an agreement American

⁶⁶ See Kielsgard, *supra* note 16.

⁶⁷ Bosco, *supra* note 62.

⁶⁸ The Rome Statute went into effect in Afghanistan after the United States already had a military presence in the country; therefore, the Court only has jurisdiction over conduct occurring after May 2003 even though U.S. personnel were present beginning in 2001.

⁶⁹ Rome Statute art. 12, ¶ 2(a).

⁷⁰ Schaefer, *supra* note 65.

⁷¹ INT'L SECURITY ADVISORY BOARD, U.S. DEP'T OF STATE, REPORT ON STATUS OF FORCE AGREEMENTS 42 (Jan. 16, 2015), <https://www.state.gov/documents/organization/236456.pdf>.

⁷² *Id.*

officials could be subjected to Afghan jurisdiction or, perhaps, that such jurisdiction could be delegated to the ICC.

However, even if the United States' behavior towards the Court could be interpreted as implicit consent to its jurisdiction, in light of the fact that the United States has not signed or ratified the Rome Statute, it is under no treaty or legal obligation to comply with the ICC prosecutor or investigation.⁷³ Furthermore, the American Service-Members' Protection Act (ASPA) prohibits the use of any funding to assist "the investigation, arrest, detention, extradition, or prosecution of any United States citizen or permanent resident alien by the International Criminal Court."⁷⁴ In order to avoid the possibility of inferred waivers of ASPA restrictions on U.S. cooperation with the ICC investigation, some commenters have recommended that the United States reject any ICC requests pertaining to the Afghanistan investigation.⁷⁵ They argue that cooperating with the ICC investigation could give the impression that the United States recognizes and consents to the Court's jurisdiction over this investigation.⁷⁶

In addition, those advocating for the United States' refusal to comply suggest that the United States should remind all governments with which it has Article 98 agreements that they are prohibited from surrendering U.S. persons to the Court or to any third party that has the intent to surrender U.S. persons to the Court.⁷⁷ The United States began negotiating Article 98 agreements—sometimes referred to as bilateral immunity agreements or bilateral non-surrender agreements—in 2002 and has concluded at least one hundred such agreements.⁷⁸ Further, in order to avoid tacit endorsement of the ICC legitimacy, these commentators also advise that the United States reassess its support for the ICC.⁷⁹ While, as previously noted, the United States has never been a member state of the Rome Statute, it has supported the Court in various ways, including voting for Security Council referrals of situations in Sudan and Libya to the ICC.⁸⁰ Moving forward, if the United States pursues this route, it would have to ensure its relationship and

⁷³ Rome Statute art. 87.

⁷⁴ 22 U.S.C. § 7423(f) (2002).

⁷⁵ Schaefer, *supra* note 65.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *International Criminal Court - Article 98 Agreements Research Guide*, GEORGETOWN L. LIB. http://guides.ll.georgetown.edu/article_98 (last visited Dec. 17, 2017).

⁷⁹ Schaefer, *supra* note 65.

⁸⁰ *Id.*

interactions with the Court could not be interpreted as consent to the Court's jurisdiction.⁸¹

Without assistance or cooperation from the United States in its investigation, there is a chance that the Prosecutor will be unable to develop enough information to bring formal charges against American officials.⁸² At the very least, ignoring the investigation until formal charges have been pressed would allow the United States to defer a decision on how to respond until it no longer had a choice.⁸³ The delay and defer course of action allows the United States to avoid any diplomatic reverberations that may result from a head-on confrontation with the ICC, which would be especially advantageous if the investigation ultimately does not result in any formal charges and the issue of jurisdiction could be adjourned for another day.⁸⁴

However, by simply ignoring the investigation, the United States puts itself at risk of the ICC interpreting its muted response as evidence of an acquiescence to the Court's claim of jurisdiction.⁸⁵ The Rome Statute specifies that if a State wishes to challenge the Court's jurisdiction, it shall make that challenge "at the earliest opportunity."⁸⁶ If the United States does not raise a challenge in the near future, it risks that future challenges could be considered waived. However, note that the individuals in question would still retain their ability to raise jurisdictional challenges until after they are formally charged and a trial has commenced.⁸⁷

The decision to delay and defer in response to the initiation of an investigation by the ICC based on a denial of ICC jurisdiction over the situation at hand would be contingent on the United States' confidence that the probability of formal charges being pressed against American officials is minimal. If such a conclusion were reached, the strategy would allow for the United States to maintain a friendly, though minimalistic, relationship with

⁸¹ *Id.*

⁸² Bosco, *supra* note 62.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ Rome Statute art. 19, ¶ 5.

⁸⁷ Note that Article 19 paragraph 4 states, "[i]n exceptional circumstances the Court may grant leave for a challenge to be brought more than once or at a time later than the commencement of the trial." There are no guidelines for what would be considered an exceptional circumstance. Rome Statute art. 19, ¶ 4.

the Court, which has broadly served U.S. interests by addressing mass atrocities around the world.⁸⁸

B. *Option 2: Challenge Jurisdiction Based on the Doctrine of Complementarity*

Under the Rome Statute, the ICC must respect the doctrine of complementarity in regards to domestic jurisdiction.⁸⁹ This means a case is inadmissible unless the states with domestic jurisdiction over the situation are unwilling or unable to genuinely prosecute the situation.⁹⁰ Article 18 of the Rome Statute specifies that, “within one month of receipt of . . . notification, a State may inform the Court that it is investigating or has investigated its nationals or others within its jurisdiction with respect to criminal acts which may constitute crimes.”⁹¹ In her statement announcing the decision to pursue the investigation at issue, the Prosecutor noted:

In undertaking this work, if authorised by the Pre-Trial Chamber, my Office will continue to fully respect the principle of complementarity, taking into account any relevant genuine national proceedings, including those that may be undertaken even after an investigation is authorised, within the Rome Statute framework.⁹²

Indicating that, even though the United States missed the one-month deadline prescribed by the statute, if the United States conducted its own investigation or could demonstrate that it has already adequately investigated the conduct at issue, the case against Americans would likely still be considered inadmissible.⁹³

Therefore, one recommendation for how the United States could respond to the possibility of an investigation is for the United States to initiate, or re-open, investigations into the conduct at issue in the ICC’s pending

⁸⁸ Bosco, *supra* note 62.

⁸⁹ Rome Statute art. 1.

⁹⁰ Rome Statute art. 17.

⁹¹ Rome Statute art. 18, ¶ 2.

⁹² INT’L CRIM. CT., *supra* note 1.

⁹³ Jennifer Trahan, *It’s High Time for the US to Conduct Complementarity As To Crimes in Afghanistan*, OPINIO JURIS (Nov. 5, 2017), <http://opiniojuris.org/2017/11/05/its-high-time-for-the-us-to-conduct-complementarity-as-to-crimes-in-afghanistan/>.

situation.⁹⁴ The United States has previously investigated allegations of detainee abuse in Afghanistan and the other pertinent states. Indeed, in 2006 it was reported that the United States had “carried out more than 600 criminal investigations into allegations of mistreatment, and more than 250 individuals [had] been held accountable for detainee abuse.”⁹⁵ According to the report, the individuals found liable have been court-martialed, served prison terms up to ten years, received formal reprimands, or were separated from the military.⁹⁶

In light of the fact that the Prosecutor determined there was “a reasonable basis to believe”⁹⁷ that U.S. armed forces and CIA members committed war crimes and crimes against humanity that deserve an ICC investigation, it is to be presumed that the United States’ aforementioned investigation did not incorporate the same conduct at issue or did not satisfy the requirements of being “conducted independently or impartially [and] in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.”⁹⁸ Otherwise those investigations would have satisfied the complementarity exemption making the situation, at least in regards to the United States’ involvement, inadmissible.⁹⁹

Many commentators argue that triggering the doctrine of complementarity jurisdiction by commencing a domestic investigation is the United States’ best response option because it would ensure that to the extent U.S. nationals are implicated, such wrongdoings are addressed within the U.S. legal system.¹⁰⁰ As commentator Jennifer Trahan noted, “[t]he U.S. has credible and effective military and civilian investigative capacities and court systems that should be utilized.”¹⁰¹ Others have suggested this would also be the best case scenario for the ICC because it would avoid a showdown between the Court and the United States that could severely tarnish the legitimacy of the Court.¹⁰² However, such an investigation would likely have

⁹⁴ *Id.*

⁹⁵ Barry F. Lowenkron, Assistant Sec’y for Bureau of Democracy, Human Rights and Labor, Opening Statement for U.S. Hearing at Committee Against Torture (May 5, 2006) (transcript available from author).

⁹⁶ *Second Periodic Report of the United States to the Committee Against Torture (CAT)*, U.S. DEPT OF STATE, <https://www.state.gov/j/drl/rls/c14907.htm> (last updated July 25, 2007).

⁹⁷ Rome Statute art. 13.

⁹⁸ Rome Statute art. 17, ¶ 2(c).

⁹⁹ Rome Statute art. 17, ¶ 1(c).

¹⁰⁰ Trahan, *supra* note 93.

¹⁰¹ *Id.*; *see also*, Rome Statute art. 17, ¶ 2(c).

¹⁰² *Id.*

to include the prosecution of senior officials in order to satisfy the complementarity requirement, a move the United States is highly unlikely to make.¹⁰³

C. *Option 3: Refute Jurisdiction as Precluded by Status of Force Agreements with Afghanistan*

As previously discussed, pursuant to the doctrine of complementarity, the ICC may only assert jurisdiction if the relevant states are unwilling or unable to pursue the alleged crimes.¹⁰⁴ The Prosecutor's decision to move forward with the investigation against American officials indicates that she believes both the United States and Afghanistan are unwilling or unable to investigate and adjudicate the challenged conduct through their domestic processes, or that such processes have been inadequate.¹⁰⁵ Although the United States asserts it has conducted independent investigations and prosecutions regarding the conduct at issue, until more details are released relating the specifics of the Prosecutor's allegations it is unclear if those processes involved the same conduct.¹⁰⁶

Furthermore, due to several multilateral and bilateral agreements, the government of Afghanistan has extremely limited legal jurisdiction over U.S. officials and services members, which makes it unlikely that Afghanistan would have the authority to pursue the contested conduct pursuant to its own jurisdiction.¹⁰⁷ One such agreement is the NATO Status of Force Agreement (SOFA). SOFA covers the United States' mission to train, advise, and assist Afghan forces and provides immunity to NATO forces from criminal prosecution.¹⁰⁸ In addition, the United States and Afghanistan negotiated a Bilateral Security Agreement (BSA) that provides for the continuation of an earlier U.S.-Afghan SOFA. This agreement granted military and civilian personnel engaged in "cooperative efforts in response to terrorism, humanitarian and civic assistance, military training and exercises, and other

¹⁰³ Mark Kersten, *Whatever Happens, the ICC's Investigation into US Torture in Afghanistan is a Win for the Court*, JUSTICE IN CONFLICT (Nov. 17, 2016) <https://justiceinconflict.org/2016/11/17/whatever-happens-the-iccs-investigation-into-us-torture-in-afghanistan-is-a-win-for-the-court/> (explaining that although high-level officials including Dick Cheney, Donald Rumsfeld, or John Yoo would likely fall within the scope of the Court's investigation, the prospect of the United States allowing for their surrender to The Hague is "virtually non-existent").

¹⁰⁴ Rome Statute art. 17.

¹⁰⁵ *Id.*

¹⁰⁶ See Trahan, *supra* note 93.

¹⁰⁷ INT'L SECURITY ADVISORY BOARD, *supra* note 71.

¹⁰⁸ *Id.*

activities” immunity from criminal prosecution by Afghan authorities, as well as immunity from civil and administrative jurisdiction except with respect to acts performed outside the course of their duties.¹⁰⁹

Thus, in light of the obligations created by these agreements, the Afghan government is contractually unable to pursue the alleged crimes because it has released its claim to jurisdiction.¹¹⁰ In an attempt to shield Americans from foreign jurisdiction, the United States unintendedly opened the door for the ICC to obtain jurisdiction over the situation at issue. As made explicit in the Rome Statute, the ICC may only assert its jurisdiction when states which have jurisdiction over the issue are unwilling or unable to genuinely prosecute.¹¹¹ Afghanistan, as the territory where the conduct occurred, is the primary state that would—absent binding agreements—have original jurisdiction over the situation at issue.¹¹² Furthermore, because Afghanistan is a member party of the Rome Statute, the ICC has a stronger claim to jurisdiction based on the fact that Afghanistan’s inability to prosecute the accused actors is the result of previously negotiated agreements instead of an informed decision to choose not to prosecute.¹¹³ In accordance with their treaty agreements, Afghanistan cannot proceed with a prosecution against Americans covered by either SOFA. Such a circumstance likely contributed to the Prosecutor’s conclusion that Afghanistan’s inability to prosecute did not bar the ICC from gaining jurisdiction.

However, while the United States’ SOFA agreements with Afghanistan may have contributed to the Prosecutor’s decision to proceed with an investigation into American’s conduct, they may also act as crucial safeguards against the ICC maintaining legitimate jurisdiction. Professor Michael Newton of Vanderbilt Law School advanced an argument against ICC jurisdiction resting upon the legal theory that when Afghanistan entered into

¹⁰⁹ *Id.*

¹¹⁰ Rome Statute art. 17.

¹¹¹ *Id.*

¹¹² Marc Grossman, Under Sec’y for Political Affairs, Remarks to the Center for Strategic and International Studies: American Foreign Policy and the International Criminal Court (May 6, 2002) (expressing the United States’ reorganization that “sovereign nations have the authority to try non-citizens who have committed crimes against their citizens or in their territory”).

¹¹³ Rome Statute art. 17.

the SOFAs with the United States in 2002, it ceded criminal jurisdiction over Americans and therefore cannot delegate that jurisdiction to the ICC.¹¹⁴

The ICC treaty entered into force for Afghanistan on May 1, 2003, after it deposited its instrument of ratification to the Rome Statute on February 10, 2003.¹¹⁵ Thus, Afghanistan's accession to the Rome Statute occurred after it voluntarily constrained the scope of its territorial jurisdiction over American nationals.¹¹⁶ As a result of Afghanistan's relinquishment of any claim to criminal jurisdiction over U.S. nationals pursuant to several SOFAs with the United States, Afghanistan cannot lawfully delegate its territorial jurisdiction to the ICC.¹¹⁷ According to Newton, "the bedrock of Article 12 authority over the nationals of non-States Parties" is the principle of transferred territoriality.¹¹⁸ Therefore, if Afghanistan no longer possesses criminal jurisdiction over the American nationals at issue, it is precluded from transferring such jurisdiction to the ICC.¹¹⁹

Newton's theory rests on the understanding that the ICC authority is exclusively derived from the delegation of state jurisdiction.¹²⁰ However, such an assumption is not wholly accepted within the international legal or scholarly community. In a response to Newton's argument, Carsten Stahn, a professor of International Criminal Law and Global Justice at Leiden University, points out an alternative model of how the ICC derives its jurisdiction.¹²¹ Stahn argues that ICC jurisdiction is actually "grounded in a broader entitlement of states and the international legal community."¹²² For more than three centuries, states have exercised universal jurisdiction: a principle that holds that international law enables each state to assert jurisdiction over certain crimes, regardless of where they were committed or

¹¹⁴ Michael A. Newton, *How the International Criminal Court Threatens Treaty Norms*, 49 VAND. J. TRANSNATIONAL L. 407 (2015).

¹¹⁵ Rome Statute art. 126, ¶ 2; see generally COAL. FOR THE INT'L CRIM. CT., FACT SHEET: AFGHANISTAN AND THE INTERNATIONAL CRIMINAL COURT (Nov. 21, 2017), http://www.coalitionfortheicc.org/sites/default/files/cicc_documents/ciccfactsheet_afghanistan_icc_0.pdf.

¹¹⁶ Newton, *supra* note 114, at 407.

¹¹⁷ *Id.* at 408.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.* at 407.

¹²¹ Carsten Stahn, *Response: The ICC, Pre-Existing Jurisdictional Treaty Regimes, and the Limits of the Nemo Dat Quod Non Habet Doctrine—A Reply to Michael Newton*, 49 VAND. J. TRANSNATIONAL L. 443 (2015).

¹²² *Id.* at 446–48.

by whom, on behalf of the international community.¹²³ Traditionally, universal jurisdiction covered mostly acts of piracy, but it has since been extended to include genocide, war crimes, and crimes against humanity—the very crimes adjudicated by the ICC.¹²⁴ Therefore, Stahn concludes, the ICC derives its jurisdiction from universal jurisdiction, rather than by a delegation of domestic jurisdiction, and Afghanistan’s agreement to grant the United States exclusive jurisdiction over its nationals does not preclude the ICC from exercising jurisdiction over the core crimes covered by universal jurisdiction.¹²⁵ However, the principle of universal jurisdiction was rejected during the Rome debates and was not included in the Rome Statute leaving an avenue for the United States to proffer the absence of Afghanistan jurisdiction as a basis for the lack of ICC jurisdiction.¹²⁶

In order to substantiate the United States’ contention that the ICC lacks jurisdiction over its nationals based on the SOFAs it has with Afghanistan, either the United States or Afghanistan must provide the agreement to the Prosecutor for consideration.¹²⁷ The SOFA signed between Afghanistan and the United States is confidential and Afghanistan deposited its instrument of accession to the Rome Statute without mention of the SOFA; further, Afghanistan accepted the treaty without reservations to the exercise of ICC jurisdiction over crimes listed in the Rome Statute committed on Afghanistan soil after May 2003.¹²⁸

Challenges to the Court’s jurisdiction may be made by an accused person or a person for whom a warrant of arrest has been issued, a State that has jurisdiction over a case on the grounds of complementarity, or a State from which acceptance of jurisdiction is required.¹²⁹ While the United States could bring a jurisdictional challenge on basis of complementarity, it could not raise the argument that the SOFAs bar prosecution because the United States does not qualify as a State from which acceptance of jurisdiction is required under

¹²³ Dalila V. Hoover, *Universal Jurisdiction Not So Universal: A Time to Delegate to the International Criminal Court* 5 (Cornell Law Sch. Paper No. 52 2011), http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1081&context=lps_clacp.

¹²⁴ *Id.* at 6.

¹²⁵ Stahn, *supra* note 121, at 449.

¹²⁶ Luis Moreno Ocampo, *The ICC’s Afghanistan Investigation: The Missing Option*, L. FARE BLOG (Apr. 24, 2017), <https://www.lawfareblog.com/iccs-afghanistan-investigation-missing-option>.

¹²⁷ Under Rome Statute art. 15, ¶ 2, the Prosecutor may receive information from reliable sources he or she deems appropriate.

¹²⁸ Ocampo, *supra* note 126.

¹²⁹ Rome Statute arts. 12, 19.

Article 12—in this case, that would only be Afghanistan, if it weren't already a States Parties, because that is where the alleged conduct occurred.¹³⁰

A challenge to the admissibility of a case or the jurisdiction of the Court must take place prior to or at the commencement of the trial;¹³¹ before there has been a confirmation of the charges, the challenges must be referred to the Pre-Trial Chamber.¹³² As such, one of the United States' options in response to the investigation is to ensure that a party capable of raising the challenge presents the assertion¹³³ that the ICC lacks jurisdiction over the accused Americans based on the legal theory that the SOFAs between the United States and Afghanistan preclude the ICC from asserting jurisdiction.¹³⁴ Such a challenge would need to be made to the Pre-Trial Chamber immediately in order to prevent the Court from moving forward with the investigation.¹³⁵

D. *Option 4: Comply with the Investigation*

One of the United States' options that has received very little scholarly or media discussion is compliance. This option has been mostly ignored for good reason—analysts agree that the United States will never cooperate with an ICC investigation against its armed forces.¹³⁶ The appointment of John Bolton, a longtime critic of the ICC, as National Security Advisor practically cements such predictions.¹³⁷ Washington actors, including Bolton, looking to “strangle the ICC in its cradle” will likely welcome the opportunity to tell the Court “no” and dare the ICC, with no police force, to do something about it.¹³⁸

¹³⁰ *Id.* Assuming the ICC is exercising proper jurisdiction on the basis of Afghanistan being a party to the Statute and the conduct having occurred within Afghanistan's territory, according to the Rome Statute, the United States' acceptance of jurisdiction is not required.

¹³¹ *Id.* art. 19 ¶¶ 4, 6.

¹³² *Id.*

¹³³ *See id.* art. 12.

¹³⁴ *See* Newton, *supra* note 114.

¹³⁵ *See* Rome Statute art. 12.

¹³⁶ *See* Lisa Clifford, *Afghanistan and the ICC: A 'Brave' First Step, But a Long Road Ahead*, IRIN (Jan. 23, 2018), <https://www.irinnews.org/analysis/2018/01/23/afghanistan-and-icc-brave-first-step-long-road-ahead>; *see also* Marissa Melton & Carla Babb, *Pentagon 'Deeply Committed' to Laws of War as ICC Considers Investigation*, VOA NEWS (Dec. 8, 2017), <https://www.voanews.com/a/pentagon-international-criminal-court-investigation/4156012.html> (quoting defense officials who reiterated the “longstanding and continuing objection in principal to any ICC assertion of jurisdiction over US personnel” of the United States).

¹³⁷ Clifford, *supra* note 136.

¹³⁸ Davenport, *supra* note 50.

However, while such a strategy has the potential to shine a light on the feebleness of an international court that lacks global participation or teeth sharp enough to have an effective bite, this stance could backfire for the United States.¹³⁹ The Court, with full knowledge of the United States' position regarding its jurisdiction, has taken brave steps to fulfill its statutory duties—it is “[d]etermined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes.”¹⁴⁰ If the ICC is unable to properly investigate or prosecute Americans, the blame will fall at the feet of Washington, not the ICC. But, in addition to avoiding blame for a failed investigation, the United States should comply with the Court in an effort to reset its human rights agenda and honor its founding commitment to justice.¹⁴¹ If the investigation results in allegations and indictments against American actors, the U.S. government should fully comply with the Court's efforts to bring justice to victims of war crimes.

A missing component of the discussion regarding the United States' options in response to this investigation is the necessity of U.S. compliance for victims to access justice. The ICC is unique among international criminal tribunals in that victims and those with “personal interests [or that] are affected” by the situation at issue have an opportunity to participate in any stage “of the proceedings determined to be appropriate” instead of only in their role as witnesses.¹⁴² The Statute explicitly provides for the possibility of victims to make representations when the Prosecutor, as in this case, seeks *proprio moto* authorization to open an investigation.¹⁴³ The Court received 245 representations on behalf of more than 700 thousand victims by the January 31, 2018 deadline for voluntary victim representations related to the Afghan investigation. These representations are critical to the Pre-Trial Chamber's

¹³⁹ See Clifford, *supra* note 136.

¹⁴⁰ Rome Statute pmbi.

¹⁴¹ The United States' human rights agenda has floundered in recent decades: it has the largest incarcerated population in the world, which is often attributed to excessive and discriminatory sentencing practices; police continue to kill black people at disproportionate rates compared to their overall share of the population; drastic cuts in refugee programs and dramatic increases in deportations has resulted in family separation and in many cases an inability for individuals to escape violent or dire situations in their home countries; and the creation and continuance of the U.S. prison at Guantanamo Bay where the United States continues to hold thirty-one men at the facility who have been there for over a decade without being charged. See *United States: Events of 2017*, HUM. RTS. WATCH: WORLD REP. 2018, <https://www.hrw.org/world-report/2018/country-chapters/united-states> (last visited Aug. 18, 2018).

¹⁴² Rome Statute art. 68, ¶ 3; *Participation: The Participation of Victims in International Criminal Court Proceedings*, REDRESS, 2012, VICTIMS' RTS. WORKING GROUP <http://www.vrwg.org/victims-rights/participation> (last visited Apr. 24, 2018).

¹⁴³ Rome Statute art. 15, ¶ 3.

decision because in order to move forward with a full investigation and possible prosecution, the Pre-Trial Chamber must be convinced that such a decision is in the interest of justice.¹⁴⁴ According to the ICC's Policy Paper of Victims' Participation, the "interests of justice" means the "interest of victims."¹⁴⁵ Therefore, it is important for the Court to know how many victims agree with prosecution, but also, how many victims would not want the prosecution to occur. Of the representations made on behalf of hundreds of thousand victims, just two families, comprising 20 victims, and 30 other individuals said they did not want an investigation.¹⁴⁶

The United States has positioned itself within the international community in such a spot that any course of action other than compliance would harm its reputation as one of the traditional champions of human rights. As an integral player in war crime tribunals¹⁴⁷ and peacekeeping missions,¹⁴⁸ the United States puts itself out as a defender of personal accountability and justice for victims of war crimes. However, its continued hypocritical stance as an enforcer against all but its own crimes has taken a toll on the United States' legitimacy in such a role.¹⁴⁹ Take for example the pressure the United States put on Balkan countries to turn over indicted person to the International Criminal Tribunal for the former Yugoslavia (ICTY). Two weeks after requiring Serbia to demonstrate full compliance with the ICTY in order to receive further U.S. assistance, the United States suspended military aid due to Serbia's refusal to sign a bilateral agreement shielding Americans from foreign jurisdiction—similar to the one currently in force between Afghanistan and America.¹⁵⁰ In response, Serbian Prime Minister Zoran Zivkovic commented, "I think it would be very difficult to explain to our

¹⁴⁴ Rome Statute arts. 15, 53; Ehsan Qaane, *Afghan Victims of War Crimes Want Investigation: Hundreds of thousands apply to ICC*, AFG. ANALYSTS NETWORK (Feb. 8, 2018), <https://www.afghanistan-analysts.org/afghan-victims-of-war-crimes-want-investigation-hundreds-of-thousands-apply-to-icc/>.

¹⁴⁵ INT'L CRIM. CT.: OFFICE OF THE PROSECUTOR, POLICY PAPER ON VICTIMS' PARTICIPATION (2010), https://www.icc-cpi.int/iccdocs/otp/Policy_Paper_on_Victims_Participation_April_2010.pdf.

¹⁴⁶ Qaane, *supra* note 144.

¹⁴⁷ Primary examples include the Nuremberg trials and the ad hoc tribunals created in the aftermath of the tragedies in Rwanda and former Yugoslavia, as well as the role it played during the founding of the ICC. See Christian Tomuschat, *The Legacy of Nuremberg*, 4 L.J. INT'L CRIM. JUST. 830 (2006).

¹⁴⁸ See, e.g., Mark Kersten, *When an Alleged War Criminal Walks into a US Embassy Says: 'Take Me to the ICC'*, JUST. CONFLICT (Mar. 19, 2013), <https://justiceinconflict.org/2013/03/19/when-a-war-criminal-walks-into-a-us-embassy-and-says-take-me-to-the-icc/>.

¹⁴⁹ See, e.g., Chris Patten, *Why Does America Fear this Court?*, WASH. POST (July 9, 2002), <https://www.washingtonpost.com/archive/opinions/2002/07/09/why-does-america-fear-this-court/3b4ed6c8-d502-4b58-af4c-85a9f6326baf/>.

¹⁵⁰ Colum Lynch, *U.S. Confronts EU on War Crimes Court: Immunity Pact Issue Threatens Relations*, WASH. POST, June 10, 2003, at A17.

people that on the one hand we will sign a bilateral agreement with the United States in which we agree to protect their citizens, while at the same time we are arresting and extraditing our citizens for trial.”¹⁵¹ The more vociferously negative the U.S. response is to an investigation involving its own citizens, the more likely global perception of the Court’s influence will improve to the detriment of the reputation of the United States.

As a nation that calls for the prosecution of war criminals before the Court, conditions foreign aid on human rights, and even engages in military intervention based on human rights violations, the United States must demonstrate that it holds to its convictions even against its own citizens. Former U.S. Ambassador-at-Large for War Crimes Issues David Scheffer said in a speech at the Centre of Human Rights in South Africa that the United States knows its “responsibilities and . . . [is] committed to fulfilling them.”¹⁵² He went on to concede, “[i]f a nation, whether a party or not to the Rome Treaty, acts irresponsibly and wages massive crimes against its own people or those of another nation, then we have no interest in permitting such a nation to enjoy any special privilege; let that nation’s war criminals stand trial before the ICC.”¹⁵³ The United States’ unwillingness to comply with the investigation would weaken its authority to oppose torture and other abuses abroad and would set an example that countries will point to in the future to justify obstruction.

In addition to political and moral justifications for compliance, in this circumstance, compliance with the Court’s investigation would also likely be the most strategic position the United States could take in order to preserve the validity of their arguments against joining the ICC.

One of the United States’ most frequently cited justifications for refusing to become a State Party of the Rome Statute is the fear that Americans would become vulnerable as political targets for prosecution and such would chill the United States’ ability to take action around the world.¹⁵⁴ In December of 2014, Senate Intelligence Committee Chairman Dianne Feinstein released

¹⁵¹ *E.U. Candidates Resist U.S. Pressure over International Criminal Court*, AGENCE FR. PRESSE, July 2, 2003.

¹⁵² David J. Scheffer, Ambassador-at-Large for War Crimes Issues, U.S. Dep’t of State, *The Global Challenge of Establishing Accountability for Crimes Against Humanity* Remarks, Remarks Before Centre for Human Rights, University of Pretoria (Aug. 22, 2000) (transcript available from author).

¹⁵³ *Id.*

¹⁵⁴ Anne K. Heindel, *The Counterproductive Bush Administration Policy Toward the International Criminal Court*, 2 SEATTLE J. SOC. JUST. 345, 345 (2004).

an executive summary of the committee's five-year review of the CIA's detention and interrogation program—the very programs at issue in the ICC's investigation.¹⁵⁵ Declassified portions of the Senate Summary made public include a redacted 499-page report that describes in detail many of the interrogation methods used on CIA detainees.¹⁵⁶ These methods included extended isolation, “sleep deprivation [which] involved keeping detainees awake for up to 180 hours, usually standing or in stress positions” and waterboarding.¹⁵⁷ While the Obama administration asserted that it conducted a criminal investigation of the CIA program, the investigation was closed without questioning current or former detainees and did not result in any criminal charges.¹⁵⁸ Considering that the ICC's investigation includes a variety of actors instead of solely Americans and that the United States was concerned by the same conduct at issue enough to conduct its own investigation, the potential probe by the ICC is clearly not one motivated by political pretext.

As such, compliance would signal that under circumstances in which the Court is working as intended—and as openly supported by the United States—the United States will work to further their aligned goals.¹⁵⁹ Moreover, because the Rome Statute provides for non-members to waive jurisdictional challenges for specific investigations while maintaining claims to sovereignty otherwise,¹⁶⁰ if the Court was ever used as a political tool against the United States, the United States' argument against such action would be made stronger by their previous cooperation.

¹⁵⁵ S. Select Comm. on Intelligence, 112th Cong., Committee Study of the Central Intelligence Agency's Detention and Interrogation Program (Declassification Revisions 2014), https://www.feinstein.senate.gov/public/_cache/files/7/c/7c85429a-ec38-4bb5-968f-289799bf6d0e/D87288C34A6D9FF736F9459ABCF83210.sscistudy1.pdf.

¹⁵⁹ Laura Pitter, *No More Excuses*, HUM. RTS. WATCH, <https://www.hrw.org/report/2015/12/01/no-more-excuses/roadmap-justice-cia-torture> (last visited Aug. 16, 2018).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ Notably, a current roadblock to compliance is the American Servicemembers' Protection Act (ASPA). 22 U.S.C. § 7423. Enacted in 2002, under the Bush administration, ASPA prohibits U.S. courts, agencies, and government entities from cooperating with the ICC.¹⁵⁹ Given that the statute sharply limits the U.S. government's ability to cooperate with the ICC, particularly in circumstances where American nationals are under investigation, in order for U.S. actors to comply with an investigation without domestic legal consequences, Congress would have to amend or repeal ASPA. Julian Bava & Kiel Ireland, *The American Servicemembers' Protection Act: Pathways to and Constraints on U.S. Cooperation with the International Criminal Court*, 12 EYES ON THE ICC 2016/2017 1, at 1–28.

¹⁶⁰ Rome Statute art. 12, ¶ 3.

Additionally, U.S. compliance would allow for greater control over how, and in some ways what, information or evidence is provided to the Court. This would not be the first time the ICC conducted an investigation from the outside. The Sudanese government similarly resisted the 2005 investigation into the Sudan/Darfur situation.¹⁶¹ This was the first situation to be referred to the ICC by the United Nations Security Council, and the first investigation in the territory of a non-State Party to the Rome Statute.¹⁶² Alex Whiting, a professor at Harvard Law School and a former senior official in the Prosecutor's office, acknowledges that investigations are more difficult when the Court's staff does not have access to the country, but he says "[i]t's not impossible. Evidence leaves the country. Witnesses leave the country."¹⁶³

To date, not a single high-level U.S. official from civilian leadership, military, CIA, or private contractor has been prosecuted for war crimes or crimes against humanity.¹⁶⁴ The ICC investigation could finally change that—bringing an end to the impunity U.S. officials have enjoyed and, critically, some measure of redress to victims of the U.S. torture program.¹⁶⁵ A successful investigation, one that is not foreclosed by the United States' refusal to cooperate, would send a clear message to victims of egregious crimes that they have recourse through an independent and impartial process, and to perpetrators of such crimes, that no one is above the law. Furthermore, if the United States is confident that its investigation into the allegations was sufficient and that American nationals did not violate international law, then it should be confident the ICC will, after a robust and unobstructed investigation, come to the same conclusion. Cooperating with an ICC investigation, regardless of the outcome, bolsters the United States' position within the international community because it signals a commitment to the rule of law and sets a new tone for what is expected from nations—States Parties and nonmembers alike—that harbor war criminals.

III. CONCLUSION

If the Pre-Trial Chamber approves the Prosecutor's request to initiate a formal investigation into the situation in Afghanistan and such an

¹⁶¹ David Smith, *ICC Chief Prosecutor Shelves Darfur War Crime Probe*, GUARDIAN (Dec. 14, 2012), <https://www.theguardian.com/world/2014/dec/14/icc-darfur-war-crimes-fatou-bensouda-sudan>.

¹⁶² *Situation in Darfur, Sudan*, INT'L CRIM. CT., <https://www.icc-cpi.int/Darfur> (last visited Aug. 16, 2018).

¹⁶³ Clifford, *supra* note 136.

¹⁶⁴ Gallagher, *supra* note 48.

¹⁶⁵ *Id.*

investigation includes allegations against American officials, the United States' response will likely play a critical role in defining the ICC's jurisdictional authority moving forward. Three of the United States' likely response options based on its past and current relationship with the ICC include: (1) declining to cooperate with the ICC based on a denial of jurisdiction due to a lack of U.S. consent; (2) negating the ICC's jurisdiction on the basis that the situation is inadmissible to the Court pursuant to the doctrine of complementarity; or (3) contesting the ICC's jurisdiction as precluded by binding agreements made between the United States and Afghanistan. Each of these responses find footing in legal arguments centered on the tension between international jurisdiction and sovereignty. However, waiving jurisdictional challenges specific to this investigation, the United States has a fourth option: compliance. Although unlikely to actualize, this course would position the United States as a global leader for human rights, bolster any future efforts to enforce prosecution against international criminals, and provide much needed recourse to victims of war crimes.

While a formal investigation into the Afghanistan situation would not be limited to American conduct and many of the atrocities at issue were carried out by non-U.S. actors, if Americans violated international law, they should be held accountable and the United States should not shield them by refusing to comply with the Court. Such refusal, based on any legal or political argument regarding jurisdiction, tarnishes the United States' reputation within the international community and weakens its legitimacy to participate in future efforts to vindicate the rights of victims of similar crimes.